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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

DONALD J. DUCHARME,

Plaintiff and Appellant,

v.

JR CAPITAL GROUP, LLC, et al.,

Defendants and Respondents.

G040945

(Super. Ct. No. 07CC11568)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, James P. Gray, Judge. Request for Judicial Notice. Judgment affirmed. Request denied.

Donald J. Ducharme, in pro. per., for Plaintiff and Appellant.

Dowdall Law Offices and Robin G. Eifler for Defendants and Respondents.

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Plaintiff Donald J. Ducharme appeals from dismissal of his action against defendants JR Capital Group, LLC and JR Enterprises, L.P. after the court refused to set

aside an order settling the case. He claims the settlement was coerced because he did not consent to scheduling of a settlement conference, he had insufficient time to retain counsel, he failed to understand the terms of the settlement, and, because he is 71 years old, the court's pressure on him to accept the terms of the settlement constituted elder abuse. None of these arguments persuades. Plaintiff also asserts the court erred in sustaining without leave to amend three causes of action of his complaint. Because we affirm dismissal after settlement the latter argument is moot.

FACTS AND PROCEDURAL HISTORY

This appeal is the culmination of several years of litigation between the parties. Plaintiff was a long-term tenant in a mobile home park owned by defendants. In 2003 plaintiff, in pro. per., sued defendants for claims arising from that tenancy. On the day trial was set 18 months later, the parties agreed to settle the case in exchange for a waiver of attorney fees and costs; plaintiff was allowed to explain on the record the circumstances leading him to file the suit, including a claim of improper billing of utility charges.

A few months later when plaintiff began withholding payment of utility charges, defendants served notices to pay or quit and to terminate possession. After plaintiff failed to comply with either, defendants filed an unlawful detainer action and obtained a judgment. Plaintiff challenged the judgment in a series of motions, appeals and writs, requests for stays, and two bankruptcies. More than two years elapsed until defendants obtained possession of the property.

Two weeks thereafter plaintiff, in pro. per., filed the instant action for breach of contract, retaliatory eviction, unfair business practices, bad faith, discrimination based on alleged selective enforcement of defaults of other tenants, and expungement of a lien defendants recorded to obtain possession of the property. Defendants demurred and

the court sustained the demurrer to the causes of action for retaliatory eviction, unfair business practices, and bad faith without leave to amend, overruling the remainder.

At the hearing on the demurrer the court noted that even though some causes of action remained, it appeared the action was based on events previously litigated and it did not appear likely plaintiff would make much progress with the case. The judge then inquired if “an early settlement conference . . . [would] be helpful” When defendant’s lawyer responded affirmatively, the judge asked if the parties could return the next day, to which both agreed. Plaintiff got to select the time.

When the parties reached a “conditional settlement” the next day, they put the terms on the record. Plaintiff agreed to dismiss the action with prejudice and also to dismiss all pending appeals filed in connection with the unlawful detainer suit. Defendants had to relinquish all rights to any amounts plaintiff owed them in connection with the prior actions, including money deposited as security during his appeals, money paid to the bankruptcy trustee, and attorney fees awarded. They also had to withdraw their claim against plaintiff in his bankruptcy. Plaintiff agreed to the terms on the record. The court found the settlement fell under Code of Civil Procedure section 664.6 and set a hearing for about six weeks in the future if the case had not been dismissed per the terms of the settlement by that date.

Less than a week later plaintiff, in pro. per., filed a “Notice of Revocation of Allege[d] Agreement to Settle” (capitalization omitted), agreeing to settle the case if defendants paid him \$50,000; a week after that he filed a motion to vacate the agreement. The grounds for the motion were that plaintiff (1) told the court he would be hiring a lawyer; (2) disagreed with defendants’ counsel’s summary of the settlement terms; (3) told the judge did not understand the proceedings; (4) was “rushed into a settlement conference” before pleadings were finalized and with less than one day’s notice; and (5) is 71 years old with disabilities, thereby “entitled to protection against unreasonable

settlements” pursuant to Title 42 United States Code section 12203 and Code of Civil Procedure section 2017.30.

The day before the hearing plaintiff hired a lawyer who “specially appear[ed]” for him. The court denied the motion, reciting what had occurred at the settlement conference. The judge first noted plaintiff was not “a stranger to litigation,” having personally tried several cases. He explained plaintiff had received quite a bit of consideration for settlement. After negotiations when the court “recapped the bidding,” plaintiff decided he did not want to settle on those terms. When the court began to terminate the proceedings, plaintiff had a change of heart and agreed to the terms, which were then “somewhat laboriously” put on the record. The court believed plaintiff understood the terms and that if he had “buyer’s remorse” it was not because he did not understand ““legalese”” or was coerced. It characterized those claims as “simply flat-out not true.” The conference was “completely voluntary” and although it occurred quickly the parties had been in litigation on the matter for many years. The court also noted that plaintiff “made out very well” in the settlement.

After the order was entered plaintiff filed an appeal (Case No. G040092) from it. (In a separate opinion we dismiss that appeal as moot.) He also filed an ex parte request to stay the action, including continuing the hearing for dismissal set for the next day, which the court denied.

The day of the dismissal hearing, plaintiff filed a second request to stay the action and a statement to disqualify the judge for cause pursuant to Code of Civil Procedure section 170.3, claiming the judge was biased because plaintiff was in pro. per. The judge denied the request for stay and refused to recuse himself. He did continue the dismissal hearing so the request for disqualification could be decided. It was subsequently denied. The dismissal hearing went forward after being continued several times. After the court denied another request for continuance it found defendants had

complied with their requirements under the settlement agreement, dismissed the case. Plaintiff then filed the instant appeal.

DISCUSSION

Plaintiff relies on four grounds to support his claim the settlement agreement should have been set aside, none of which has merit.

First, he claims the settlement conference was set too quickly, depriving him of his right to obtain an attorney. But the record reveals he agreed to participate in the settlement conference. When the court asked whether the parties were willing to schedule a voluntary conference, plaintiff agreed. He maintains that only defendants' counsel agreed, whereupon the judge "took it upon himself to decide for [plaintiff] the appropriateness of the early settlement conference, and, without [plaintiff's] input, asked [plaintiff]" whether he could return the next day. He argues that when defendants' counsel agreed to attend, it "prevented [him] from answering 'no' to" the court's question about whether he was interested in attending the settlement conference. He also asserts that because he was in pro. per. he "did not realize that [he] was being railroaded into an early settlement conference . . . without . . . an opportunity to consult a lawyer."

The court's observations about the scheduling of the settlement conference do not support this claim. It noted the conference had been "completely voluntary" and pointed out plaintiff's lengthy experience acting in pro. per. Additionally, except for the appearance of a lawyer on plaintiff's behalf at the hearing on the motion to vacate, plaintiff had conducted the years of litigation with defendants representing himself. Nothing in the record shows or even implies that plaintiff had trouble expressing himself if he disagreed with something. The hearing where the settlement was put on the record amply demonstrates this.

As for his claim the judge should have allowed him to retain counsel, he does not accurately recount the record. The judge did suggest plaintiff get a lawyer, but this was in connection with the argument on the demurrer and was in the context of being able to prove his case at trial. He stated that to the extent plaintiff believed he had “a viable, legal action . . . , you’re going to want to get an attorney. This is a very difficult task you are undertaking, um, it is extremely difficult.” Further, if plaintiff had wanted time to retain counsel he could have requested it, declined to participate in the conference, asked for a later date, or taken any other action he felt necessary. The conference was not forced on him.

The record also belies plaintiff’s claim the court misstated the fact the parties had reached a “‘proposed’ resolution” and went forward on the basis of the incorrect presumption. When the parties were ready to put the settlement terms on the record, the judge began by stating he understood the parties had agreed to resolution of this and all related cases. In denying the motion to vacate the court specifically stated plaintiff had agreed to the terms and characterized the motion to vacate as “buyer’s remorse.” “When the same judge hears the settlement and the motion to enter judgment on the settlement, he or she may consult his memory. [Citation.]” (*Terry v. Conlan* (2005) 131 Cal.App.4th 1445, 1454.) Further, as with plaintiff’s other arguments, if he had not agreed, he had the opportunity to object or disagree and failed to do so.

Plaintiff emphasizes he was unclear what was being done when the settlement was put on the record and the court “over persuaded” him to understand. (Capitalization and italics omitted.) He claims the record shows “the entire discussion” of the terms of the settlement “is unintelligible” and he repeatedly told the judge he did not understand. Not so. First, before defendants’ counsel began reciting the terms, the court advised plaintiff to ask questions if he did not understand something, and he did.

The record does reveal that defendants’ counsel was somewhat repetitive and used typical legalese in setting out terms such as “dismissal with prejudice.” And the

judge did express some impatience with that, finally resorting to setting out some of the terms himself. But every time plaintiff said he did not understand, the court explained. For example, when counsel used the phrase “dismissed with prejudice,” plaintiff immediately said he did not “agree with that,” asking, “I’m prejudiced?” The court then proceeded to explain the meaning of the phrase. The court continued to explain terms as the conditions of the settlement were set out.

Despite plaintiff’s current claim, after the recitation of settlement terms he specifically stated he understood and agreed with them. And the judge “flat-out” rejected plaintiff’s argument he did not understand, characterizing it as “not true.” “In ruling on a motion to enter judgment the trial court acts as the trier of fact, determining whether the parties entered into a valid and binding settlement. [Citation.]” (*Terry v. Conlan, supra*, 131 Cal.App.4th at p. 1454.) The court determined here that plaintiff understood and agreed to the terms, noting they were quite favorable to him. That the court never asked plaintiff his understanding of the settlement terms does not negate the finding he comprehended them.

Moreover, there is no evidence the court “over persuaded” plaintiff to agree to anything. The record amply demonstrates that if plaintiff does not want to agree he takes every possible action not to.

Further, nothing in the record supports a claim of undue influence under Civil Code section 1575. (Civil Code section 1570, to which plaintiff cites, deals with menace and is not applicable here.) Undue influence includes “taking an unfair advantage of another’s weakness of mind” or “taking a grossly oppressive and unfair advantage of another’s necessities or distress.” (Civ. Code, § 1575, subds. 2, 3.) Plaintiff did not set out any facts in his declaration filed with his motion to vacate the settlement showing any undue influence. And he points to nothing in the record supporting his contention. In determining if there has been undue influence, “we are concerned with whether from the entire context it appears that one’s will was overborne and he was

induced to do or forbear to do an act which he would not do, or would do, if left to act freely. [Citations.]” (*Keithley v. Civil Service Bd.* (1970) 11 Cal.App.3d 443, 451.)

We also reject plaintiff’s claim the circumstances of the settlement constituted elder abuse under Code of Civil Procedure section 2017.310 and Title 42 United States Code section 12203. First, there is no evidence he was “railroaded” into a settlement. Second, Code of Civil Procedure section 2017.310 has no relevance here. It prohibits a confidential settlement agreement in a case alleging elder abuse. Likewise, Title 42 United States Code section 12203, subdivision (b) does not apply. It bars coercion of a person exercising rights under the Americans With Disabilities Act (42 U.S.C. § 12101 et seq.) and the Age Discrimination in Employment Act (29 U.S.C. § 621 et seq.).

In an appeal from refusal to set aside a settlement agreement we determine whether substantial evidence supports the order. (*Terry v. Conlan, supra*, 131 Cal.App.4th at p. 1454.) The evidence supports the decision here.

Because we have established that the court did not err in upholding the settlement agreement, the status of the underlying complaint is irrelevant. The appeal from the order sustaining the demurrer to three causes of action without leave to amend is moot.

Plaintiff filed a request for judicial notice “in support of [his] reply brief.” (Capitalization omitted.) He seeks to have us review defendants’ notice to the Superior Court, Appellate Department that plaintiff’s appeal of an award of attorney fees in the underlying case was moot due to settlement of the case and the court’s decision of the appeal on the merits, denying the notice of mootness, which it deemed to be a motion for dismissal. We deny the request. Had we granted it, defendants would not have had an opportunity to discuss the documents in their respondents’ brief. More importantly, these documents are irrelevant. They appear to deal with an appeal of an issue that has been subsumed into the settlement of the case.

DISPOSITION

The judgment is affirmed. Respondents are entitled to costs on appeal.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

ARONSON, J.

FYBEL, J.